

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GEROD ANTONIO HARRISON,

No. C 12-0963 YGR (PR)

Plaintiff,

ORDER OF SERVICE;

v.

**ORDER DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**

A. HEDGPETH, et al.,

INSTRUCTIONS TO CLERK

Defendants.

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a). Defendants are directed to file a dispositive motion or notice regarding such motion on or before January 23, 2013, unless an extension is granted. **The Court further directs that defendants are to adhere to the new notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.**

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
3 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
4 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
5 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

6 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
7 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
9 plausibility when the plaintiff pleads factual content that allows the court to draw the
10 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
11 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
12 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
13 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
15 (1) that a right secured by the Constitution or laws of the United States was violated, and
16 (2) that the alleged violation was committed by a person acting under the color of state law.
17 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

18 **B. Legal Claims**

19 Plaintiff alleges that defendants, employees of Salinas Valley State Prison, used
20 excessive force, or failed to act to prevent or arrest the use of such force. More specifically,
21 plaintiff alleges that on February 13, 2010 (1) correctional officers D. Murphy, M. Perez,
22 V. Logan used excessive force on him; (2) correctional officers J. Vasquez, Ambriz,
23 Tschabold, A. Vasquez, and A. Meza observed this use of force and did not intervene;
24 (3) Murphy and J. Vasquez, in a separate incident that same day, again used excessive force
25 against him; (4) Ambriz, A. Vasquez, Perez, Logan, and Meza observed this second use of
26 force and did not intervene; and (5) Lt. Krenke, A. Meza, and Anthony Hedgpeth, warden of
27 Salinas Valley, failed to properly train and supervise defendants. Liberally construed, these
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1 claims are cognizable under § 1983.

2 CONCLUSION

3 For the foregoing reasons, the Court orders as follows:

4 1. The Clerk of the Court shall issue summons and the United States
5 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
6 attachments thereto, and a copy of this order upon the following defendants at Salinas Valley
7 State Prison: D. Murphy, M. Perez, V. Logan, J. Vasquez, Ambriz, Tschabold, A. Vasquez,
8 A. Meza, Lt. Krenke, and Anthony Hedgpeth. The Clerk shall also mail courtesy copies of
9 the complaint and this order to the California Attorney General's Office.

10 2. No later than ninety (90) days from the date of this order, defendants shall file
11 a motion for summary judgment or other dispositive motion with respect to the claims in the
12 complaint found to be cognizable above.

13 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
14 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
15 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
16 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
17 (2003). **Plaintiff is “entitled to notice — similar to the notice for motions for summary**
18 **judgment described in *Rand v. Rowland*, 154 F.3d 952 (9th Cir.1998) (en banc) —**
19 **explaining the requirements for a response to” a motion to dismiss for failure to**
20 **exhaust administrative remedies.** *Stratton v. Buck*, No. 10-35656, slip op. 11477, 11483
21 (9th Cir. Sept. 19, 2012).

22 b. Any motion for summary judgment shall be supported by adequate
23 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
24 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
25 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
26 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
27 the date the summary judgment motion is due.

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2 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
3 served on defendants no later than forty-five (45) days from the date defendants' motion is
4 filed.

5 a. In the event the defendants file an unenumerated motion to dismiss
6 under Rule 12(b), plaintiff is hereby cautioned as follows:

7 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the
8 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative
9 remedies. The motion will, if granted, result in the dismissal of your case. When a party you
10 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly
11 supported by declarations (or other sworn testimony) and/or documents, you may not simply
12 rely on what your complaint says. Instead, you must set out specific facts in declarations,
13 depositions, answers to interrogatories, or documents, that contradict the facts shown in the
14 defendant's declarations and documents and show that you have in fact exhausted your
15 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
16 appropriate, may be granted and the case dismissed.

17 b. In the event defendants file a motion for summary judgment,
18 the Ninth Circuit has held that the following notice should be given to plaintiffs:

19 The defendants have made a motion for summary judgment by which they
20 seek to have your case dismissed. A motion for summary judgment under Rule
21 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
22 Rule 56 tells you what you must do in order to oppose a motion for summary
23 judgment. Generally, summary judgment must be granted when there is no
24 genuine issue of material fact — that is, if there is no real dispute about any
25 fact that would affect the result of your case, the party who asked for summary
26 judgment is entitled to judgment as a matter of law, which will end your case.
27 When a party you are suing makes a motion for summary judgment that is
properly supported by declarations (or other sworn testimony), you cannot
simply rely on what your complaint says. Instead, you must set out specific
facts in declarations, depositions, answers to interrogatories, or authenticated
documents, as provided in Rule 56(e), that contradict the facts shown in the
defendants' declarations and documents and show that there is a genuine issue
of material fact for trial. If you do not submit your own evidence in opposition,
summary judgment, if appropriate, may be entered against you. If summary
judgment is granted in favor of defendants, your case will be dismissed and

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1 there will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998)
2 (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil
3 Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party
4 opposing summary judgment must come forward with evidence showing
5 triable issues of material fact on every essential element of his claim). Plaintiff
6 is cautioned that failure to file an opposition to defendants' motion for
7 summary judgment may be deemed to be a consent by plaintiff to the granting
8 of the motion, and granting of judgment against plaintiff without a trial. *See*
9 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v.*
10 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

11 4. Defendants shall file a reply brief no later than fifteen (15) days after
12 plaintiff's opposition is filed.

13 5. The motion shall be deemed submitted as of the date the reply brief is due. No
14 hearing will be held on the motion unless the Court so orders at a later date.

15 6. All communications by the plaintiff with the Court must be served on
16 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
17 of the document to defendants or defendants' counsel.

18 7. Discovery may be taken in accordance with the Federal Rules of Civil
19 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
20 Rule 16-1 is required before the parties may conduct discovery.

21 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
22 court informed of any change of address and must comply with the court's orders in a timely
23 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
24 pursuant to Federal Rule of Civil Procedure 41(b).

25 9. Extensions of time must be filed no later than the deadline sought to be
26 extended and must be accompanied by a showing of good cause.

27 10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs
28 be given "notice of what is required of them in order to oppose" summary judgment motions
at the time of filing of the motions, rather than when the court orders service of process or
otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874
(9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when**

1 **they file and serve any motion for summary judgment:**

2 The defendants have made a motion for summary judgment by which they seek
3 to have your case dismissed. A motion for summary judgment under Rule 56
4 of the Federal Rules of Civil Procedure will, if granted, end your case.

5 Rule 56 tells you what you must do in order to oppose a motion for summary
6 judgment. Generally, summary judgment must be granted when there is no
7 genuine issue of material fact — that is, if there is no real dispute about any
8 fact that would affect the result of your case, the party who asked for summary
9 judgment is entitled to judgment as a matter of law, which will end your case.
10 When a party you are suing makes a motion for summary judgment that is
11 properly supported by declarations (or other sworn testimony), you cannot
12 simply rely on what your complaint says. Instead, you must set out specific
13 facts in declarations, depositions, answers to interrogatories, or authenticated
14 documents, as provided in Rule 56(e), that contradict the facts shown in the
15 defendants' declarations and documents and show that there is a genuine issue
16 of material fact for trial. If you do not submit your own evidence in opposition,
17 summary judgment, if appropriate, may be entered against you. If summary
18 judgment is granted, your case will be dismissed and there will be no trial.

19 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

20 **IT IS SO ORDERED.**

21 DATED: _____ October 25, 2012

22 
23 YVONNE GONZALEZ ROGERS
24 UNITED STATES DISTRICT COURT JUDGE